2005

State of Utah v. Mynor Armando Ardon- Aguirre : Brief of Appellee

Utah Court of Appeals

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Case No. 20050720-CA

IN THE

UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Mynor Armando Ardon-Aguirre,
Defendant/Appellant.

Brief of Appellee

Appeal from a conviction for manslaughter, a second degree felony, in the First Judicial District Court of Utah, Cache County, the Honorable Thomas L. Willmore presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES, RULES, AND REGULATIONS

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STATEMENT OF JURISDICTION

Defendant appeals from a conviction for manslaughter, a second degree felony, in violation of Utah Code Ann. § 76-5-205 (West 2004). This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (West 2004).

STATEMENT OF THE ISSUE

Was defendant's trial counsel constitutionally ineffective in permitting defendant to be sentenced on the same day he entered a guilty plea and in permitting defendant to provide his account of what led to the fatal shooting of Oscar Arrieta?

Standard of Review. "An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law." *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162. However, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Rule 22(a)

> Upon the entry of a plea or verdict of guilty or plea of no contest, the court shall set a time for imposing sentence which shall not be less than two nor more than 45 days after the verdict or plea, unless the court, with the concurrence of the defendant, otherwise orders. Pending sentence, the court may commit the defendant or may continue or alter bail or recognizance.
>
> Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

STATEMENT OF THE CASE[1]

Defendant was charged by criminal information with the murder of Oscar Arrieta. R. 1-2, 51-52. Following a preliminary hearing, defendant was bound over to stand trial as charged. PH; R. 53-55. Defendant averted a trial on the murder charge when, pursuant to a plea agreement, he pled guilty to an amended charge of manslaughter. R. 53-55, 78-79, 85-94; PH. In doing so, defendant acknowledged that on March 27, 2005, he agreed to fight with the victim later that day at a prearranged location; he arrived for the fight armed with a .22 caliber pistol; and

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[1] This "Statement of the Case" includes both a summary of the proceedings and a summary of the underlying facts, as described by the prosecutor and affirmed by defendant when the prosecutor provided a factual basis for the plea. Because the transcripts in this case were not paginated when the record was indexed, the July 21, 2005 hearing (where defendant pled guilty and was sentenced) is cited as "SH." The preliminary hearing transcript is cited as "PH."

after being choked, he drew the pistol and fired four shots into the victim, one of which entered the victim's back, penetrated vital organs, and caused the victim's death. SH: 7. After conducting a rule 11 colloquy to ensure that defendant's plea was knowing and voluntary, the trial court accepted his guilty plea. SH: 3-8.

After accepting defendant's plea, the court advised defendant that if he "desire[d] to withdraw that plea [he] must file a written motion with the court prior to [his] sentencing and show that [his] plea was not knowingly and voluntarily made." SH: 8. The court then advised defendant that he had "the right to wait to be sentenced." He was informed that the law required the judge to wait two days before sentencing him "unless [he was] willing to waive that right and be sentenced [that day]." SH: 8. After noting that defense counsel had previously notified the judge that defendant wished to be sentenced that day, the court asked, "Do you want to be sentenced today?" SH: 8. Defendant responded, "Yes." SH: 8. After hearing from the victim's father and allowing defendant to make a statement in allocution, the district court sentenced defendant to an indeterminate prison term of one-to-fifteen years. R. 95-97; SH: 61. The court also ordered that defendant be delivered to the Department of Homeland Security for deportation proceedings after his release from prison. R. 96; SH: 62. Defendant timely appealed. R. 99-100.

Contrary to defendant's assertion on appeal, Aplt. Brf. at 6, the trial court provided a Spanish interpreter for defendant in all but one hearing attended by defendant. *See* R. 5, 7, 43, 47, 53, 63, 74, 95. In the only hearing where an interpreter is not identified in the record, the trial court simply continued the preliminary

hearing, at defense counsel's request. *See* R. 38-39. The minutes indicate that an interpreter was used at the July 21, 2005 hearing, in which defendant pled guilty and was sentenced. *See* R. 95; *see also* SH: 6 (trial court asking whether there was any interference with the interpretation).

SUMMARY OF ARGUMENT

Defendant claims that his trial counsel rendered ineffective assistance of counsel because he allowed him to be sentenced immediately following entry of his plea and his statement in allocution. Defendant's claim fails at the outset because nothing in the record suggests that counsel did not advise defendant not to proceed with sentencing or give a detailed allocution. Defendant's claim rests in part on the contention that the single hearing disposition precluded defendant from his right to withdraw his plea. Defendant, however, does not have a right to withdraw his plea. A plea may only be withdrawn upon a showing that it was not entered knowingly or voluntarily. Defendant has made no such showing. Defendant's claim also rests on the contention that his statement in allocution should not have been given on the same day of sentencing. This claim fails because such an allocution is required to be made before sentencing. In any event, defendant has shown no prejudice. Absent any alleged error, there is no reasonable probability that defendant would have been given probation for manslaughter rahter than sentenced to prison.

ARGUMENT

TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE

Defendant contends that his trial counsel was constitutionally ineffective because he permitted him to enter a guilty plea and be sentenced, "all in the same hearing." Aplt. Brf. at 9. He contends that the single hearing disposition deprived him of (1) his "right to withdraw his plea," and (2) his right to "be sentenced at a time where the judge may have had more information about the Defendant, and the emotional state of the Judge, with regard to Defendant's acts, would have had time to wear off." Aplt. Brf. at 9. Defendant's argument is frivolous.

To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test established in *Strickland v. Washington*, 466 U.S. 668, 689 (1984). He must demonstrate that (1) "counsel's performance was deficient," and (2) "the deficient performance prejudiced the defense." *Id.* at 687. Defendant makes neither showing.

A. A motion to withdraw the guilty plea would have been futile.

Defendant first contends that by permitting him to be sentenced immediately following the plea, trial counsel "failed to preserve [his] right to withdraw his plea." Aplt. Brf. at 9. He argues that he was thus "unable to reconsider his position, withdraw his plea, and go to trial and tell his story of self-defense." Aplt. Brf. at 13, 15. This claim lacks merit.

The "withdrawal of a plea of guilty is a privilege, not a right." *State v. Gallegos*, 738 P.2d 1040, 1041 (Utah 1987). The purpose of allowing a defendant to

withdraw his guilty plea is not to enable him to "reconsider" his decision. Aplt. Brf. at 13, 15. Rather, it "is to permit him to undo a plea which was unknowingly, unintelligently, or involuntarily made." *Gallegos*, 738 P.2d at 1041. Thus, "[a] plea of guilty . . . may be withdrawn *only* upon leave of the court and a showing that it was not knowingly and voluntarily made." Utah Code Ann. § 77-13-6(2)(a) (West 2004) (emphasis added).

In this case, defendant has made no claim that the plea was made unknowingly or involuntarily. To the contrary, defendant concedes that the trial court "carefully addressed the issue of whether [he] had willingly entered his plea of 'guilty.'" Aplt. Brf. at 10. Indeed, a review of the record establishes that defendant was fully advised of his constitutional rights to a trial verdict, as contained in rule 11, Utah Rules of Criminal Procedure, and that he knowingly and voluntarily waived those rights. The court's compliance with rule 11 created a presumption that defendant's plea was knowingly and voluntarily entered. *See State v. Gamblin*, 2000 UT 44, ¶ 11, 1 P.3d 1108.

The trial court discussed the constitutional rights to a trial verdict with defendant at the July 21, 2005 hearing. SH: 3-8. During that hearing, defendant also signed a plea affidavit, written in Spanish, that fully explained those rights. R. 85-94; SH: 8. The court properly incorporated that plea affidavit. Defendant affirmed to the court that he reads and speaks the Spanish language and that he had read the affidavit or had it read to him at least three times. SH: 4-5. He affirmed that he understood the affidavit and did not have any questions about it. SH: 5. He also

affirmed that he understood that by pleading guilty he was giving up all of those constitutional rights, as explained by the court and in the plea affidavit. SH: 6. Thereafter, defendant affirmed that no promises were made in exchange for his guilty plea and that no one was forcing him to plead guilty. SH: 6. Defendant also attested that he was pleading guilty because he was guilty. Finally, defendant agreed with the prosecutor's factual basis for the charge, affirming that he shot the victim four times with a .22 caliber pistol, twice in the back, causing the victim's death. SH: 7.

Because defendant knowingly and voluntarily pled guilty, he had no basis for filing a motion to withdraw his guilty plea. The law is well settled that "the failure of counsel to make motions or objections which would be futile if raised does not constitute ineffective assistance." *State v. Malmrose*, 649 P.2d 56, 58 (Utah 1982); *accord State v. Atkin*, 2006 UT App 155, ¶ 15, 135 P.3d 894.[2] Accordingly, counsel did not perform deficiently in allowing defendant to be sentenced immediately after

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[2] Counsel's decision not to act in such cases cannot be considered deficient, nor can such failure be said to result in any prejudice.

entry of the plea (to the extent counsel can even be held responsible for defendant's decision to be sentenced immediately following his plea).[3]

B. Counsel was not ineffective in "allowing" defendant's statement in allocution immediately after the plea but before sentencing.

Defendant also contends that counsel was ineffective in allowing him to waive the time for sentencing because the judge's "emotional state," caused by defendant's allocution, did not have any "time to wear off." Aplt. Brf. at 9. Defendant argues that "the trial court needed a 'cooling off' period, to regain some sense of independence from the emotion of the minute." Aplt. Brf. at 11. He reasons that because "[j]udges are human, . . . we [should] presume that they need time to absorb what they have heard and give it appropriate weight after the emotion has faded away." Aplt. Brf. at 13. He concludes that "[c]ounsel's decision directly affected the sentence, as it put the judge in the position of having to issue a sentence without having any time to completely shed the emotional response to a horrible situation." Aplt. Brf. at 14. Defendant's argument lacks merit.

Defendant's argument fails at the outset because it relies on two unsupported factual assertions: (1) that counsel "encouraged, rather than discouraged,

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[3] Defendant claims that the court "did not address the fact the [sic] immediate sentencing would deprive [him] of his right to withdraw his plea and go to trial." Aplt. Brf. at 10-11. To the contrary, the court specifically advised defendant that if he wished to withdraw his plea, he "must file a written motion with the court *prior to [his] sentencing* and show that [his] plea was not knowingly and voluntarily made." SH: 8. Having been thus informed, defendant was well aware that in agreeing to be sentenced that day, he would forego an opportunity to move for the withdrawal of his plea.

[defendant] to be sentenced immediately following his allocution," Aplt. Brf. at 10, and (2) that counsel made "no attempt to prevent" him from unnecessarily incriminating himself by making a statement that "went far beyond what is required to accept a plea agreement," Aplt. Brf. at 9. Nothing in the record supports these assertions. As such, this Court must presume that counsel properly advised defendant on both of these issues. *See Strickland*, 466 U.S. at 689 (holding that "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment").[4] Having failed to establish that counsel's performance was deficient, defendant's ineffectiveness claim fails.

Defendant ineffectiveness claim also fails because it confuses defendant's statement, made pursuant to rule 22, Utah Rules of Criminal Procedure, with a so-called "plea allocution," which is offered to satisfy the "factual basis" requirement of rule 11. Defendant complains that his trial counsel allowed him to give a

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[4] For purposes of resolving defendant's argument only, this Court may thus presume that counsel did in fact discourage him from waiving the time for sentencing and from giving a lengthy allocution detailing the events surrounding the homicide. This presumption, however, does not suggest that contrary advice would have necessarily constituted ineffective assistance. Indeed, there are sound reasons for a defendant to be candid with the court prior to sentencing. As observed by the Utah Supreme Court, continued claims of innocence after a guilty verdict "may offend or disturb the sentencer, who must consider factors such as a defendant's acceptance of personal responsibility and willingness to be rehabilitated." *State v. Maestas*, 2002 UT 123, ¶ 56, 63 P.3d 621. Agreeing to be sentenced immediately might also demonstrate a willingness to accept responsibility without excuse.

statement that "went far beyond what is required to accept a plea agreement." Aplt. Brf. at 9. The statement, however, was not a "plea allocution" and had nothing to do with the acceptance of defendant's guilty plea.

Under rule 11, the trial court may not accept a guilty plea unless it finds "there is a factual basis for the plea." Utah R. Crim. P. 11(e)(4)(b). In this case, the trial court asked the prosecutor, rather than defendant, to provide a factual basis for the plea. SH: 7. After the prosecutor did so, defendant agreed that "that [is] what happened." SH: 7. Defendant's subsequent statement, to which he now finds fault, served a different purpose. The statement was made under rule 22(a), which "codifies the common-law right of allocution, allowing a defendant to make a statement in mitigation or explanation *after conviction but before sentencing*." *State v. Wanosik*, 2003 UT 46, ¶ 18, 79 P.3d 937 (emphasis added). [5] Defendant's complaint that his statement "went far beyond what is required to accept a plea agreement" thus misses the mark. Aplt. Brf. at 9. The statement was not given to satisfy the "factual basis" requirement for taking a plea. Rather, it was given in response to the court's allocution offer under rule 22. *See* SH: 13.

Under rule 22, the trial court was required to "afford the defendant an opportunity to make a statement" in allocution "[b]efore imposing sentence." Utah R. Crim. P. 22(a). Therefore, even had defendant been sentenced at a later date, his

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[5] Rule 22 provides: "Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed." Utah R. Crim. P. 22(a).

statement in allocution still would have occurred at the sentencing hearing. The judge thus would still be subject to the "emotional" reaction arising from the facts of the case.

Moreover, trial counsel cannot be faulted for not "jump[ing] up and tell[ing] the Defendant he had said enough." Aplt. Brf. at 11. The Utah Supreme Court has held that "[a]llocution is an 'inseparable part' of the right to appear and defend in person guaranteed by the Utah Constitution." *Maestas*, 2002 UT 123, ¶ 48 (quoting *State v. Anderson*, 929 P.2d 1107, 1109-10 (Utah 1996)). The allocution decision, therefore, rests with defendant. Counsel was in no position to prevent defendant from exercising his "constitutionally guaranteed right to allocution" before sentencing. *Maestas*, 2002 UT 123, ¶ 48.

* * *

Even assuming arguendo that counsel's performance was deficient, defendant cannot show prejudice. Defendant claims that "the judge may have had more information about [him]" had sentencing been scheduled for a later date. Aplt. Brf. at 9. However, he does not suggest what that information might be, nor does he explain how it would have affected the court's determination. *Strickland*, 466 U.S. at 694. The sentencing guidelines recommend imprisonment for manslaughter, even when there are no other aggravating factors. *See* Utah Court Rules Annotated, Appx. D, at 1567 (2004). Moreover, the trial court is entitled, if not obligated, to consider the nature and circumstances of the offense. *See* Utah Code Ann. § 76-3-402(1) (West 2004). Defendant pled guilty to killing a man. With or without

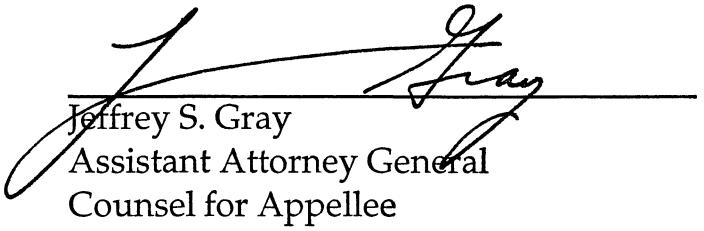
defendant's elaboration, and whether sentencing occurred immediately following the plea or days or weeks thereafter, it cannot be said that absent any alleged error, a "reasonable probability" exists that "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm defendant's conviction.

Respectfully submitted September 1, 2006.

Mark L. Shurtleff
Utah Attorney General



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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2006, I served two copies of the foregoing Brief of Appellee upon the defendant/appellant, Mynor Armando Ardon-Aguirre, by causing them to be delivered by first class mail to his counsel of record as follows:

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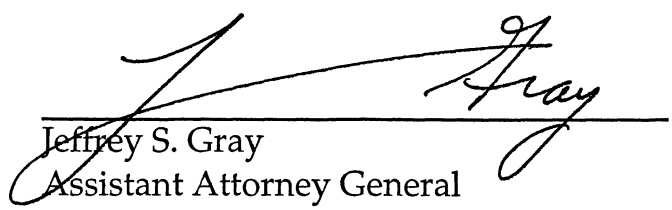

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